United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-7262

ORIGINAL

To be argued by
ALVIN M. FEDER

In The

United States Court of Appeals

For The Second Circuit

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Plaintiff-Appellant,

- against -

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---------- X DOCKET NO.

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA, 75-7262

Plaintiff-Appellant,

-against-

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,

Defendants-Appellees.

---------- X

PLAINTIFF-APPELLANT'S BRIEF

ISSUES

1. When the Judge in the first trial of a wrongful death case finds that the issues of negligence and contributory negligence are questions of fact for the jury to decide, should another Judge of coordinate jurisdiction decide on virtually the identical evidence in the second trial that the issues are not questions of fact for a jury to decide?

2. Was there sufficient evidence to raise questions of fact for a jury to determine?

3. Was a $69,500 verdict in favor of the parents of a thirty-two year old son supportable by the evidence?

4. Was a $10,000 verdict for conscious pain and suffering supportable by the evidence?

5. If this Court vacates the second Judge's directing a judgment for defendants n.o.v., should this Court send the case back for a new trial, or should it reinstate the verdict and direct that judgment be entered for the plaintiff?

STATEMENT

This was the second trial of a wrongful death case involving a New York decedent and defendants, who were Pennsylvania residents.

The decedent, Rajinder Mehra, was struck and fatally injured by defendants, the owner and operator of an automobile, on a northbound lane of a divided four lane highway, Route 309, in Allentown, Pennsylvania.

Rajinder Mehra was a thirty-two year old, highly educated, gifted individual, who had

come to Allentown, Pennsylvania, for an appointment at Lehigh University (63a) in connection with his position as a procurement editor of a publishing house. (62a) It was his duty to solicit professors to write books for his company to publish. (62a) His immediate supervisor, Mr. Beschler, was the last known person to have seen him alive. Decedent left Mr. Beschler in Philadelphia with a rented car and arrived in Allentown, Pennsylvania. (64a) That same evening at 11:15 P. M., he was found lying on the road, after having been struck by defendants' automobile.

In the first trial, U. S. District Judge Orrin G. Judd found that the evidence raised questions of fact and submitted the case to the jury. The jury returned a verdict for the defendants.

After the verdict, Judge Judd granted to plaintiff a new trial on the ground that the Court had erred in admitting evidence concerning insurance on decedent's life, which should have been ruled inadmissible. Judge Judd not only ruled that there were questions of fact for a jury to decide, but, in effect, perceived a miscarriage of

justice if he were to allow defendants' verdict to stand, after a trial in which inadmissible evidence had been admitted. (94a, 95a)

In the second trial before U. S. District Judge Thomas C. Platt, the plaintiff produced the identical witnesses as he did on the first trial. Defendants' version of the accident also remained constant. The same examination before trial of the defendant driver that was read by plaintiff's counsel at the first trial was read again at the second trial. (23a)

This time, however, the Court, having heard the identical case, reserved decision on defendants' motion to dismiss at the end of plaintiff's case and at the end of the entire case. After the jury returned a verdict for the plaintiff, Judge Platt granted defendants' motion for judgment notwithstanding the verdict.

We, thus, have the bizarre result of one judge finding that there were factual issues requiring jury determination (even finding that a verdict for defendants should be set aside); and a second judge finding that there were no factual issues requiring jury determination.

Plaintiff, having prevailed with the jury, nevertheless, is now cast in the posture of appellant, trying to dissuade this Court from the following conclusions advanced in Judge Platt's Opinion: (1) Defendants were not negligent as a matter of law; (2) decedent was contributorily negligent as a matter of law; (3) the amount of the verdict for wrongful death was "incredible"; (4) there should be no recovery for conscious pain and suffering; and (5) if the Court of Appeals vacates the judgment for defendants, the Court should not reinstate the verdict, but should send the case back for a new trial.

Each of these five conclusions is erroneous.

This entire appeal can be reduced to one question of whether Judge Platt's unusually zealous interpretation of the facts should override not only a jury determination in plaintiff's favor, but also another U. S. District Judge's finding that there were factual questions requiring a jury determination.

POINT I

UNDER THE DOCTRINE OF THE LAW OF THE CASE, THE SECOND JUDGE SHOULD HAVE FOLLOWED THE FIRST JUDGE'S RULING THAT THERE WERE QUESTIONS OF FACT FOR A JURY TO DECIDE.

O'Brien v. Lehigh Valley R. R., 177 Misc. 25, 30 N.Y.S. 2d 287 (Sup. Ct., Mon. Co., 1941) aff'd 264 App. Div. 831, 35 N.Y.S. 2d 752, aff'd 289 N.Y. 783, 46 N.E. 2d 847 (1943), is a case directly in point. In that wrongful death case, the first trial Judge submitted the issues of negligence and contributory negligence to the jury. The jury was unable to reach a verdict. At the second trial, defendants moved to dismiss the complaint on the grounds that defendants were not negligent and decedent was contributorily negligent, both as a matter of law. The motions were denied. The Trial Court ruled:

> "...On the first trial of the action, the issues of negligence and contributory negligence on evidence that was substantially the same as that produced before me were submitted to the jury. This determination was reached by another Judge of coordinate jurisdiction and power, and I am constrained to abide by his ruling in the absence of any decisive circum-

> stances distinguishing the issues and the state of the evidence on the first trial from those before me." 177 Misc. at 26

Our case is precisely the same. The instant action is for wrongful death. The issues in dispute were the questions of negligence and contributory negligence. The first Judge sent the issues to the jury. In our case, however, the second Judge did not adhere to the first Judge's ruling, but ruled that the issues were not questions of fact for the jury.

The doctrine of the law of the case is equally well known to the federal courts. At one point, the 2nd Circuit held flatly that a second Judge cannot review the findings of one of his colleagues. ..."It is settled in this Circuit that when one District Judge rules on a motion his decision is the law of the case and cannot be reviewed by one of his colleagues. Commercial Union of America, Inc. v. Anglo-South American Bank, Ltd., 2 Cir. 1925, 10 F. 2d 937." Continental Assurance Co. v. Tucker, 138 F. Supp. 242 (S.D.N.Y. 1955)

Although this rule has been somewhat liberalized, the doctrine of law of the case

still requires that the second Judge should normally follow the rulings of the first Judge, so long as the issues are the same. 1B Moore, Federal Practice 2nd Edition, §0.404[4].

Accordingly, Judge Platt erred in failing to follow the law of the case determined by Judge Judd that the issues of negligence and contributory negligence were factual questions requiring jury determination.

POINT II

THERE WAS SUFFICIENT EVIDENCE FROM WHICH A JURY COULD FIND THE DEFENDANTS NEGLIGENT, AND IT WAS ERROR FOR THE COURT TO DISTURB SUCH A FINDING.

Based on the evidence, there was ample support for the jury's finding that defendants were negligent.

(A) Defendants Failed to Maintain a Proper Lookout

The evidence indicated that the driver's range of vision was unobstructed and decedent was in his range of vision. Judge Platt, himself, said, during the argument of defendants' motion

at the end of plaintiff's case, that "...the other inference is that the defendants were not looking. That's a question of fact for a jury..." (70a) Judge Platt repeated his opinion after the verdict, stating, "It is conceivable to me that the jury could have found the defendant negligent based on the evidence..." (90a) Thus, twice the Court found that the jury could hold the defendants negligent.

Defendant driver's negligence was established by his own testimony. The driver testified that the road was straight, (72a, 91a) that the decedent was not over the apex of a hill, (73a) and that the road was clear and his vision was clear. (23a) The windshield broke as a result of a "thud", (27a) and that the windshield "shattered in", (76a) causing cuts on the driver's face from the glass that came into the car. (76a) This is probative of the fact that it was the front portion of defendants' car that struck the decedent, and that the driver should have seen him. It is also probative of the fact that decedent was on his feet--perhaps standing; perhaps moving--or else he could not have been propelled above the hood of

the car and into the windshield.

Further, the fog light on the car's left front fender was broken as a result of the accident, (31a) and the left front fender itself was dented. (77a) There was ample testimony, as well as a photograph of the car after the impact (92a) from which a jury could properly conclude that the decedent was in the driver's view, if the driver were paying attention to the road. The jury could have properly inferred from the photograph of the dent on the left front fender of the car (92a) that decedent was within the driver's view prior to impact.

Defendant driver also acknowledged that in the picture of the front bumper taken while the car was still at the scene of the accident a portion of the bumper appears to be "darker than the remaining part of the bumper." (80a) Is not the dark portion of the front bumper probative of the fact that the decedent may have been struck by the front of defendants' car, and, therefore, should have been seen by the defendant driver?

Defendant driver acknowledged that

not only had he not seen the decedent prior to impact, but it was only after the occupants of another car had told him that they thought he hit a hitchhiker that he realized what had happened. (23a)

Defendant driver testified at an Examination before Trial, which was read to the jury, that prior to the time that he heard the thud he did not see anything in front of him. (75a) At the trial, he said "an instant before" the thud he saw an "image". (75a) Both of the defendant's versions are supportive of the jury finding defendant negligent. Not to see a human being who was there, or only to see an "image" an instant before the contact, are both probative of the conclusion that defendant failed to maintain a proper lookout.

Under the Pennsylvania "proper lookout rule", a motorist will not be exonerated from a finding of negligence by claiming that he did not see what must have been clearly visible to him. The driver's failure to see that which was there constitutes negligence.

The Pennsylvania statute, 75 Purdons §1002(a) reads:

"Any person driving a vehicle on a highway should drive the same at a careful and prudent speed, not greater than nor less than is reasonable and proper, having due regard to the traffic surface, and width of the highway, and of any other restrictions or conditions then and there existing; and no person shall drive any vehicle, upon a highway at such speed as to endanger the life, limb, or property of any person, nor at a speed greater than will permit him to bring the vehicle to a stop within the assured clear distance ahead."

In Frisina v. Dailey, 395 Pa. 280, 150 A2d 348 (1959), the Pennsylvania Supreme Court commented upon the following testimony:

"Q. I believe you testified that you looked in all directions; is that correct? A. That is correct.'

"Q. And you didn't see Mr. Frisina anywhere? A. No, sir.'

"Q. When was the first time you saw Mr. Frisina? A. When I got out of the car and walked to the rear of the car and looked down.'

"Q. You didn't know what you had struck? A. No sir.'

* * *

"Q. You have no recollection of seeing a body? A. No sir.'

> "Q. Flying above the hood of your car and coming down on the fender? A. No sir."
>
> "A motorist, who says that he did not see a pedestrian so directly in his path that he engages him head-on, places himself in the dock of accountability from which he is not released until he satisfactorily explains why his eyesight failed to tell him what was clearly visible, why his muscular reactions failed to respond to what should have been an instinctive urge to avoid doing injury to others, and what caused the lapse in the unceasing vigilance required and expected of every motorist. From the above quoted testimony it is obvious that Dailey did not even begin to make any kind of an explanation as to why the figure of a man, vividly silhouetted before him on an illuminated street, did not register on his retina and on his consciousness as a careful motorist." 395 ID. at 282-283.

It is submitted that the holding in Frisina is dispositive of the question of negligence in the instant case.

In Schwartz v. Jaffe, 324 Pa. 324, 188 A. 295 (1936) the Court held:

> "The accident occurred at night and, in this circumstance, as we have often stated, a driver of a motor vehicle must proceed at such pace, with such caution and

with such use of his faculties that his headlights will disclose to him impediments to his travel, and have his car under such control that, when these are disclosed, he will be enabled to avoid the dangers present."

In Nalevenko v. Marie, 328 Pa. 586, 19: A. 49 (1937), the Court recited the general rule:

"...The decisions of this court have firmly established the rule that it is the duty of the driver of an automobile so to operate his machine in the darkness as to be able to stop or avoid any obstacle which may present itself within the range of his lights: Filer v. Filer, 301 Pa. 461; Mason v. Lavine, Inc., 302 Pa. 472; Simrell v. Eschenbach, 303 Pa. 156; Cormican v. Menke, 306 Pa. 156; Shoffner v. Schmerin, 316 Pa. 323."

In Forsythe v. Wohlfarth, 35 Pa. D.&C. 2d 785 (Alleg. Co. C.P.) aff'd 205 Pa. Super, 416, 209 A2d 868 (1965), the Court held:

"Whether a driver's failure to discover the presence of the deceased in time to avoid the accident was due to a lack of due care, or whether, as alleged by defendant, lack of opportunity to so observe because the deceased suddenly appeared in front of the driver, presents an issue of fact to be determined by the jury under proper instructions..." 35 Pa. D.&C. 2d at 788.

See also, King v. Brillhart, 271 Pa. 301, 144 A. 515 (1921) and Dennis v. Munyan, 139 Pa. Super. 310, 11 A.2d 566 (Super. Ct. 1940)

Accordingly, in the instant case, there was ample evidence and law to sustain the jury's finding of negligence.

(B) Defendants Were Driving Too Fast.

The co-defendant, the driver's girlfriend (subsequently his wife) testified that the automobile was being driven "approximately 55" miles per hour. (87a-1) Certainly, her testimony as to her knowledge of the car's speed was far from convincing:

> "A. Just as a matter of course, when I'm a passenger in a car, I just generally glance over at the speedometer.' (88a)
>
> "Q. In this case you looked over at the speedometer just before the accident?'
>
> "A. Some time before the accident, yes.' (88a)
>
> "Q. Could you see the speedometer just by sitting back in your seat?'
>
> "A. I would probably have to lean over a little, but not much." (88a)

The credibility to be attributed to defendants' testimony was a question for the jury. There was ample reason for the jury to disbelieve the defendants. The foregoing testimony concerning the speed of the car, and the identical testimony at trial by both defendants as to the sequence and number of drinks and the one cup of coffee afterwards that the driver had, strains credulity. (23a) Defendants' testimony that they failed to take the names of the disinterested witnesses also reflects unfavorably on their credibility. (82a)

The severity of the blow that caused decedent's death is also probative of substantial force and speed of the car. See Nalvenko v. Marie, supra at 590.

Even if the jury believed defendants' testimony that they were going 55 miles per hour, (26a) the jury could have reasonably concluded that under all the circumstances (i.e., having had two scotches and one beer, driving someone else's car and the fact that it was night time) driving even at the admitted speed was so fast as to constitute negligence.

(C) Defendants Did Not Have the Car Under Control

The jury could have concluded that the driver did not have his vehicle under such control as not to escape being negligent.

Defendant testified that it took him 400 to 500 feet to bring the car to a stop from the time he applied his brakes. (32a)

Based upon the evidence, the jury had more than a sufficient basis upon which to rest its decision.

Any or all of the following conclusions were supportable by the proof.

1. The defendant should have seen the decedent.

2. Defendant was driving too fast.

3. Defendant did not have the car under control.

It is significant that Judge Platt ignored the foregoing inferences that were available to the jury and chose, instead, to rely on defendant driver's self-serving conclusions, such as "the vehicle was fully under control," (98a) and that "Bentz was maintaining a normal lookout ahead." (98a) The failure

of Judge Platt in not permitting the jury to draw the ultimate inferences from the evidence highlights the question of the proper division of responsibility between Judge and jury. It is supportive of the fact that in this case Judge Platt invaded the province of the jury.

If need be, the jury verdict for the plaintiff could be fortified by referring this Court to the words of Judge Judd as to what defendants were doing at the moment of the accident, (7a, 8a) and what they could have done to avoid hitting decedent, (8a) but that would be no more relevant than Judge Platt's opinion. It is the jury's province and function to resolve the different inferences that can be drawn from the testimony. What greater support can there be for allowing a jury to decide this case than the fact that two U. S. District Judges have drawn opposite conclusions from the same evidence?

In Tenant v. Peoria & Pekin Union R.R., 321 U.S. 29, 35 (1944), the Court defined the division of responsibility between Court and jury as follows:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable...(Citations omitted.) That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In Lavender v. Kurn, 327 U.S. 645 (1946), a jury verdict for the plaintiff was reversed by the Supreme Court of Missouri which had held that there was no substantial evidence of negligence to support the submission of the case to the jury. The Supreme

Court of the United States reversed and held:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."
> 327 1D. 653

Also, in Dick v. N.Y. Life Ins. Co., 359 U.S. 437 (1959), a plaintiff's jury verdict was reversed by the Court of Appeals, finding that the facts and circumstances could not be reconciled with any reasonable theory. Despite such a strong expression by the Court of Appeals, the Supreme Court held that the Court of Appeals committed its basic error in resolving a factual dispute, and reversed the decision of the Court of Appeals and reinstated the jury verdict.

Furthermore, the New York rule on the burden of proof in a death case is that plaintiff is not held to as high a degree of proof as an injured plaintiff who can himself describe the occurrence. Noseworthy v. City of New York, 298 N.Y. 76, 80, 80 N.E. 2d 744 (1948).

POINT III

DEFENDANTS DID NOT SATISFY THEIR BURDEN OF PROOF IN ESTABLISHING CONTRIBUTORY NEGLIGENCE SO AS TO TAKE THE ISSUE AWAY FROM THE JURY.

Federal courts look to the law of the forum state with respect to such matters as burden of proof, presumptions and sufficiency of evidence. In Jackson v. Coggan, 330 F. Supp. 1060 (S.D.N.Y. 1971), the Court stated the following well-known rule:

> "In matters of evidence the law of the forum controls, with respect to presumptions, admissibility, the burden of proof, and weight and sufficiency of evidence..." [Citations omitted]

See also, Olsen v. New York Central R. R., 232 F. Supp. 28 (S.D.N.Y. 1964), aff'd 341 F.2d 233 (2d. Cir. 1965).

These cases are consistent with the conflict of law decisions in New York which state that the law of the forum controls on questions of burden of proof, presumptions and sufficiency of the evidence. Clark v. Harnischfeger Sales Corp., 238 App. Div. 493, 264 N.Y.S. 873 (2nd Dept., 1933).

In New York, the burden of proof with regard to contributory negligence in death actions is

placed upon the defendant.

EPTL Section 5-4.2 reads:

> "On the trial of an action to recover damages for causing death the contributory negligence of the decedent shall be a defense, to be pleaded and proved by the defendant."

It is significant that Judge Platt failed to state that defendant had the burden of proof on the question of decedent's contributory negligence. Indeed, defendant offered no testimony as to decedent's conduct at the time or prior to the collision. Defendant testified that he saw nothing before the accident (75a) (except at one point defendant did testify that he saw an "image".) (75a)

Accordingly, there is no evidence to indicate that decedent failed to exercise care at the time he was struck. Defendants presented no testimony that decedent did not exercise vigilance on the roadway. There was no testimony that the decedent did not look or did not see the defendants' car. Decedent may have looked and misjudged the speed or distance of defendants' car; he may have been trying to wave down help just as defendants themselves later testified they did; or he may

have been doing any one of a number of things which decedent assumed would not cause him injury or death. Based on the defendants' lack of testimony with respect to decedent's conduct, the jury could reasonably have found that defendants did not sustain their burden of proving decedent's contributory negligence. See, Smith v. Pittman, 396 Pa. 296, 152 A.2d 470 (1959).

In addition to the burden of proof as to contributory negligence being squarely on the defendant, the law of New York creates a presumption "that if any possible hypothesis based on the evidence forbids the imputation of fault to the deceased, as a matter of law, the question is for the jury." So said Judge Pound in Chamberlain v. Lehigh Valley R.R. Co., 238 N.Y. 233, 144 N.E. 512, Rearg. den. 239 N.Y. 634, 147 N.E. 227. See also, Cruz v. Long Island R.R., 28 App. Div. 2d 282, 284 N.Y.S. 2d 959 (1st Dept., 1967).

In Kriesak v. Crowe, 44 F. Supp. 636 (M.D. Pa. 1942) aff'd 131 F.2d 1023 (3rd Cir., 1943), one of the issues before the Court concerned the contributory negligence of a decedent where there was no testimony concerning his actions at or before the

collision. The deceased was seen lying on the right side of Route 940 in Pennsylvania at 2:00 A. M. by the defendant driver. Defendant testified that he veered to the left to avoid hitting the object, drove a short distance and returned to investigate. Defendant and his passenger found that the object was a body.

After a verdict was returned for the plaintiff, defendant moved for judgment, n.o.v., and, if denied, for a new trial, raising three issues: (1) defendant's negligence, (2) contributory negligence of the decedent, and (3) proximate cause of the death of the decedent.

All motions were denied and the Court upheld the jury verdict for the plaintiff. On the question of contributory negligence, the Court stated:

> "...The evidence does not show how the deceased came to be lying on the highway. He had a right to use the highway but whether he fell upon the highway or had been previously struck down, the evidence does not show. The deceased was alive when defendant approached him. The deceased is presumed to have exercised care to protect his own life. Under all the circumstances, the question of contributory negligence of the deceased is one of fact for the jury." 44 F. Supp. at 638

See also, Dennis v. Munyan, supra, King v. Brillhart, supra, Forsythe v. Wohlfarth, supra, and Frisina v. Dailey, supra.

There is no testimony to support Judge Platt's conclusion that decedent did not see the driver's headlights, (106a) although there is testimony that defendant driver did not see the decedent. (75a)

The decedent may have looked and misjudged the speed and/or the distance of defendants' car or may have looked and seen nothing. Under either circumstance, the question of the decedent's contributory negligence is properly one for the jury. The rule was expressed in Smith v. Pittman, supra. as follows:

> " 'Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or in other words where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury.' " See also Campbell v. Balis, 380 Pa. 245, 110 A. 2d 254 (1955) where we said that

> 'A pedestrian must exercise continued vigilance while crossing a street (Lorah v. Rinehart, 243 Pa. 231); but just where he should look depends upon shifting conditions and is a question of fact rather than of law.' and our recent holding in Frisina v. Dailey, 395 Pa. 280, 150 A. 2d 348." 396 Pa. at 300 [Emphasis Supplied]

By the nature of how the accident happened, the questions of whether decedent saw the driver, or the driver saw the decedent, are intertwined. It is because there was no testimony that decedent did not look that the jury should be the real judge as to the inferences to be drawn from the evidence. For Judge Platt to find it perfectly reasonable that the driver did not see the decedent, (106a) but "utterly incredible that the plaintiff's intestate failed to see the headlights of the approaching Volkswagon" (106a) further demonstrates Judge Platt's usurpation of the jury's function.

In Harner v. John McShain, Inc., of Maryland, 394 F. 2d 480 (4th Cir., 1968), the sole issue presented on appeal was whether the plaintiff was guilty of contributory negligence "as a matter of law." The jury had returned a verdict for the

plaintiff, and the trial judge set the verdict aside and entered judgment n.o.v. for the defendant. As to contributory negligence, the trial judge in Harner concluded: "that the plaintiff did not on the occasion of the accident exercise the degree of care for his own safety that an ordinarily prudent person would have exercised in like or similar circumstances."

The Court of Appeals reversed and directed the reinstatement of the verdict:

> "The question of contributory negligence in this case is not a question of law but is simply a question of opinion or judgment in regard to a particular set of facts...' [Citations omitted]
>
> ...
>
> " 'In federal courts, at least, the Seventh Amendment writes into the basic charter the belief that trial by jury is the normal and preferable mode of disposing of issues of fact in civil cases***. The Supreme Court has been zealous to safeguard, perhaps even to enlarge, the function of the jury. '..... [Citations omitted]
>
> ...
>
> "That the district judge's viewpoint on the issue of contributory negligence was an entirely reasonable one does not matter..." 394 id. at 481-482

POINT IV

DECEDENT'S INTOXICATION, IF IN FACT HE WAS INTOXICATED, IS NOT CONTRIBUTORY NEGLIGENCE PER SE.

Judge Platt accepted the testimony that the blood alcohol content was .39 per cent. It is precisely because the test was so inordinately high that the accuracy or reliability of the result is ripe for disbelief. Defendants produced at the trial neither the person who drew the blood, nor the person who tested the blood, so as to satisfy the jury that there was no error in the drawing of the blood or computing the blood alcohol content. The only testimony on this subject came from Mr. Shoemaker who was Chief of the Clinical Toxicology Laboratory of the Pennsylvania Department of Health in Philadelphia. (83a) He testified that neither he nor anyone in the laboratory supervised the drawing of the blood which was done in Allentown. (84a) Only one sample of blood was drawn, although two is preferred to assure accuracy. (84a) He had no knowledge of whether the label on decedent's tube truly reflected that this was decedent's blood. (82a, 87a) Under all those circumstances, the jury

was not obligated to accept the validity of the test results.

Even if decedent was found to be intoxicated, intoxication in and of itself does not constitute contributory negligence. For defendants to meet their burden of proof as to decedent's contributory negligence, defendants must prove that the intoxication was a contributing cause of the accident.

In the instant case, there is not one iota of testimony to indicate that the intoxication in any way interfered with the decedent's actions on the highway.

It is, therefore, incumbent on defendants to come forward with proof that the intoxication interfered with decedent's action on the highway, if they are to meet their burden.

In Olsen v. N.Y. Central R. R., supra. the jury had requested a supplemental instruction "as to whether intoxication, per se, on the part of Mr. Olsen is not to be considered as contributory negligence," to which District Judge Bonsal charged as follows:

> "Intoxication, per se, is not contributory negligence, but it is a factor which you may consider with all the other factors in determining whether Mr. Olsen took reasonable precautions for his own safety."

The Court of Appeals, Second Circuit, in refusing to set aside the verdict for the plaintiff, examined the propriety of the judge's charge, stating:

> "Decedent's voluntary intoxication would not constitute contributory negligence as a matter of law. The question was properly submitted to the jury." [Citations omitted] 341 F2 at 235

In Rodak v. Furey, 31 App. Div. 2d 816, 298 N.Y.S. 2d 50 (2nd Dept. 1960), in which the trial court dismissed the complaint at the end of plaintiff's case, the Appellate Division reversed and granted a new trial. The facts were that the decedent, who had been intoxicated, was lying on the center line of the highway at approximately 4:00 A. M., when he was struck by the defendant's vehicle, the defendant having testified that at no time did he see the decedent. The Court dismissed the effect of the decedent's intoxication:

> "Intoxication in itself is not negligence as a matter of law but may be considered by the jury with the other facts in the case...Nevertheless, in a

> common law negligence action where the intoxication directly contributed to the injury it is a bar to recovery ...Furthermore, where only one inference can be drawn under the circumstances, the Court may decide as a matter of law whether or not the decedent's inebriated condition substantially contributed to the accident...At bar, the appendix is insufficient to determine as a matter of law whether the decedent was contributorily negligent."

See also, Bovey v. State, 93 N.Y.S.2d 560, in which the Court stated:

> "It is not, however, conclusive on the issue of intoxication, or, at least is not conclusive on the effect which the degree of intoxication found may have had in the particular situation. The state's expert...could and did state that Hicks was intoxicated according to established scientific standards based on urinalysis, but not having actually seen Hicks at the time, could not and did not state that such intoxication had rendered him unable or unfit to drive a car. Therefor, while we surmise that his condition of intoxication probably had an effect upon his manner of operating the automobile and upon his attention to the road conditions and warnings, we are not able to find and we do not find, that such condition was necessarily the cause of the accident."

In the absence of any proof in the instant case that the deceased failed to exercise due care, there was no basis for the Court concluding that the test results rendered the decedent contributorily negligent as a matter of law.

POINT V

A VERDICT OF $69,500 FOR WRONGFUL DEATH WAS NOT EXCESSIVE.

In Hart v. Forchelli, 445 F.2d 1018 (2nd Cir., 1971), cert. den'd. 404 U.S. 940, an 18-year old freshman at Syracuse University, survived by his mother, was awarded $252,000 by the jury. Judge Weinstein refused to reduce the verdict, and judgment was entered accordingly. The Court of Appeals affirmed.

The salient facts on damages in our case show a 32-year old man survived by his mother and father. Decedent's salary as a procurement editor of a book publishing house at the time of death was $15,000. (56a) Were he to live until the day of the trial, his immediate superior at Academic Press testified that he would be earning "around $20,000, at least." (65a) His health was

very good. (61a)

He demonstrated a potential to earn money apart from his position as a procurement editor. He was under contract with Simon & Schuster to write two textbooks, "College Mathematics" and "College Chemistry." (52a) Professor Nickolakis, who was Chairman of the Mathematics Department at Long Island University, where and when decedent had been an instructor for three years, (66a) testified that when he had edited decedent's manuscript on "College Mathematics" sometime before he died, the manuscript was 80% complete. (67a) Rajinder Mehra edited four dictionaries: "Dictionary of Physics and Mathematics - Abbreviations," "Dictionary of Computer Age Systems and Abbreviations, Signs and Symbols" and "Encyclopedia - Signs and Symbols." (56a) He also edited the following books: "Complex Variables," "Engineering Mathematics," "Probabilities," "Statistics" and "Transistor Analysis." (55a) His intelligence and ability could certainly have been deemed to have a monetary conversion factor.

His father, age 59, was earning $11,000. (58a) Decedent was giving between $100 and $200 a month to his father, who was using this money, or

substituting same for his own money, to help support his mother and yet another child. (59a)

Decedent was the first one of his family to come to this country from India, and, then sponsored not only his mother and father and grandmother, but also his three sibling. He supported his parents for one and one-half years when they first came to the United States in 1967. (43a)

At one point, while he was teaching at Long Island University, his parents, his grandmother, two of his sibling and sister-in-law, lived with him in his two-bedroom apartment. (46a) He was very generous and a family-minded man. The testimony highlighted his excellent character, his affection to his parents and the services that he performed for his parents. (68a, 69a)

If Timothy Hart had not yet earned one dime and his mother was allowed to keep $252,000, shouldn't Mr. and Mrs. Roshan Mehra be entited to keep $69,500?

Judge Platt denigrated the jury's capacity to decide the issues. He wrote that "the parties stipulated during the course of the trial that the maximum amount of the allowable funeral expenses was $2,411.31 and left to the jury solely

the question of the reasonableness thereof. Despite such stipulated maximum, the jury returned a verdict for $2,500 for funeral expenses." (109a)

In the very next sentence in the Court's Opinion, after seeing fit to emphasize the jury's inaccuracy to the extent of $88.69, the Court then proceeds to make an error of its own in the amount of $2,000. The Opinion says, "the award of $67,500 for wrongful death is also incredible in the light of the evidence." (109a)

The fact is that the jury awarded $69,500 for wrongful death ($67,000 for support payments and $2,500 for funeral expenses). (94a)

Carrying Judge Platt's reasoning to its logical conclusion, if the jury's verdict is to be looked at with skepticism because of its $88.69 error, how should we look at the reasoned Opinion of the Court that contains a $2,000 error?

POINT VI

THE VERDICT OF $10,000 FOR CONSCIOUS PAIN AND SUFFERING WAS JUSTIFIABLE.

In Olsen v. New York Central R. R., supra, decedent drowned after falling into the East River from defendant's tug. The Trial Court held:

> "Whether Olsen underwent any pain and suffering prior to his drowning was a question of fact for the jury's consideration on all the circumstances presented in the evidence. Meehan v. Central Railroad Company of New Jersey, 181 F. Supp. 594, 625-626 (S.D.N.Y. 1960)." 232 F2 Supp. at 29

In Meehan v. Central Railroad Company of New Jersey, 181 F. Supp. 594, 625-626 (S.D.N.Y. 1960), cited approvingly by the Court in Olsen, the Court sustained a jury verdict for $10,000 for pain and suffering prior to death, stating at Pg. 625:

> "Under these circumstances, this Court is unable to say that the decedent endured no pain and suffering. It is true that this cause of action must be sustained, if at all, on circumstantial evidence. However, I, therefore, sustain this cause of action. The jury has assessed a value of $10,000 to this pain and suffering. I cannot state as a matter of law that this is excessive..."

It is difficult to improve upon Judge Judd's language, when he denied the motion to dismiss this cause of action. (13a, 14a)

> "I think it is a question for the jury. If a person bleeds to death I don't think the jury has to say that he necessarily died instantly, especially when the pronouncement of death didn't come until an hour or so later."

POINT VII

IF THE JUDGMENT FOR DEFENDANTS IS VACATED, THIS COURT SHOULD REINSTATE THE JURY'S VERDICT, AND DIRECT THE ENTRY OF JUDGMENT FOR THE PLAINTIFF.

Rule 50(c)(1) of the Federal Rules of Civil Practice provides, in part, "...In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed, unless the appellate court has otherwise ordered."

If the words "unless the appellate court has otherwise ordered" is to have any meaning, it means that the appellate court is not bound by the Trial Judge's conditional granting of a new trial, but may reinstate the verdict or modify it. It stands to reason that the Trial Court should not have the power to bind the appellate court in the event this court vacates the judgment.

The commentary to the Advisory Committee on Federal Rules specifically addresses itself to this portion of the rule and states:

> "...And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict." [Citations omitted] 28 USCA Pg. 377, F.R.C.P. rule 50(c)(1)

If this Court decides that on the record before it there was sufficient evidence to support the jury's verdict and that Judge Platt was wrong in taking it upon himself to be the trier of fact, what would be served by having a third trial? Once this Court decides that the case was one properly for the jury, there is no point in having still another jury hear this case.

In Fireman's Fund Insurance Co. v. Aalco Wrecking Co., 466 F.2d 179 (8th Cir., 1972), the Court reasoned:

> "It has been recognized...that where the trial court finds the verdict contrary to the weight of the evidence and grants a new trial that the appellate court should 'exercise a closer degree of scrutiny and supervision...in order to protect the litigants' right to jury trial.'...Thus, it has been held that a trial judge should not grant a new trial merely because he believes another result would be more reasonable...Where the subject matter of the litigation is simple; where there exists no complicated evidence or where the legal principles presented are such that they would not confuse the jury, the court should be reluctant to grant a new trial...'
>
> "...In the present case we find that the evidence presented does not require reconsideration by a new jury. The evidence is such

that reasonable men may differ as to the result, therefore, the determination should properly be left for the jury."

See also, O'Neil v. W. R. Grace & Co., 410 F.2d 908 (5th Cir., 1969) and Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, (2nd Cir. 1965) cert. denied 382 U.S. 983 (1966).

CONCLUSION

The jury's verdict should be reinstated and judgment entered for the plaintiff on the verdict.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROSHAN L. MEHRA, etc.,

Plaintiff-Appellant,

- against -

ROBERTA BENTZ et ano.,

Defendants-Appellees,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **New York** *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the **14th** *day of* **August** *19* **75** *at* **415 Madison Ave, N.Y., N.Y.**

deponent served the annexed Brief *upon*
BOWER & GARDNER

the **Attorneys** *in this action by delivering* 2 *true copy* es *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this **14th**
day of **August** *19* **75**

Robert T. Brin

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977